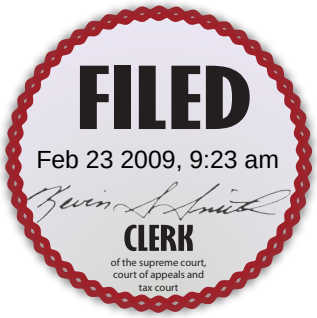

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IN THE
COURT OF APPEALS OF INDIANA

LAMONT ALEXANDER BARR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0806-CR-298
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0710-MR-7

February 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Lamont Alexander Barr appeals his convictions for voluntary manslaughter as a class A felony,[1] intimidation as a class C felony,[2] and his status as an habitual offender.[3] Barr raises three issues, which we restate as:

I. Whether the trial court abused its discretion by denying Barr's motion to sever the intimidation and murder charges;

II. Whether the trial court erred by instructing the jury regarding voluntary manslaughter but denying Barr's proposed involuntary manslaughter instruction; and

III. Whether the trial court erred by denying Barr's motion for a directed verdict on the intimidation charge.

We affirm.

The relevant facts follow. On October 29, 2007, Barr was at a friend's house when Angela Thompson came to visit him. Adrian Ivey was with Thompson but stayed in his truck while Thompson talked to Barr. Barr asked Thompson for a cigarette, but she did not have any cigarettes and went back to Ivey's truck. Barr followed Thompson and asked Ivey, whom he did not know, for a cigarette. Ivey responded that he did not have any cigarettes, and Barr reached into the truck and attempted to grab a cigarette.

Ivey exited the truck and told Barr to return the cigarettes. Barr denied having Ivey's cigarettes, and Ivey started to pat down Barr and reach into Barr's pockets. Barr told Ivey to "back off" because "you don't know me like that." State's Exhibit 20. Barr

[1] Ind. Code § 35-42-1-3 (2004).

[2] Ind. Code § 35-45-2-1 (Supp. 2007).

[3] Ind. Code § 35-50-2-8 (Supp. 2007).

also said, "Man, you don't be reaching on me like that, man." Id. Barr told Ivey to "get up off him," but Ivey refused. Id. Barr then told Ivey that he would "pop" Ivey with a gun if Ivey did not stop reaching into his pockets. Id. Barr pulled a knife out of his pocket and said, "you better get off me." Id. When Ivey continued to reach into Barr's pockets, Barr struck Ivey in the neck with the knife. Id. Ivey got into his truck and drove away, but crashed into a tree seconds later, and ultimately died from the neck wound.

Barr went to Kenneth Ramsby's house, showed him two knives, and said that he "got in an argument with somebody and - - over a cigarette or something and stuck somebody." Transcript at 203. The next day, Vincent Davidson saw Barr in a grocery store. Davidson asked Barr about the previous evening and asked him to turn himself in to the police. Barr got "hostile," pulled out a knife, and "threatened to kill [Davidson] like the guy he had killed the night before." Id. at 184. Barr then ran out of the grocery store with Davidson chasing him, Davidson flagged down a police officer, and Barr was apprehended.

The State charged Barr with murder, intimidation as a class C felony, and being an habitual offender.[4] Barr filed a motion to sever the intimidation charge, which the trial court denied. At the jury trial, Barr proposed that the trial court instruct the jury regarding the lesser included offenses of reckless homicide and involuntary manslaughter. Ultimately, the trial court gave instructions on murder, voluntary manslaughter, and reckless homicide but rejected the involuntary manslaughter

instruction. Barr also requested a directed verdict on the intimidation charge, but the trial court denied the motion. The jury found Barr guilty of voluntary manslaughter as a class A felony and intimidation as a class C felony and found that Barr was an habitual offender. The trial court sentenced Barr to forty years on the voluntary manslaughter conviction enhanced by thirty years due to Barr's status as an habitual offender and a two-year concurrent sentence on the intimidation conviction.

I.

The first issue is whether the trial court abused its discretion by denying Barr's motion to sever the intimidation and murder charges. Two or more offenses may be joined in the same indictment or information when the offenses are: (1) of the same or similar character, even if not part of a single scheme or plan, or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Ind. Code § 35-34-1-9. If two or more offenses are joined for a trial in the same indictment or information solely upon the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. Ind. Code § 35-34-1-11(a); see also Brown v. State, 650 N.E.2d 304, 305-306 (Ind. 1995). "In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense . . . ." Ind. Code § 35-34-1-11(a); see also Brown, 650 N.E.2d at 305-306. In so doing, the trial court is to

[4] The State also charged Barr with theft as a class D felony, but Barr filed a motion to sever the

consider: (1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. Ind. Code § 35-34-1-11(a); see also Brown, 650 N.E.2d at 305-306. Where severance is not mandated by Ind. Code § 35-34-1-11(a), "[w]e will only reverse the judgment and order new, separate trials if the defendant can 'show that in light of what actually occurred at trial, the denial of a separate trial subjected him to such prejudice that the trial court abused its discretion in refusing to grant his motion for severance.'" Brown, 650 N.E.2d at 306 (quoting Hunt v. State, 455 N.E.2d 307, 312 (Ind. 1983)).

Barr filed a motion to sever the murder and intimidation charges, but the trial court denied the motion. Barr later renewed his motion, but the trial court denied it again. The trial court found that the murder and intimidation were a "series of acts connected together." 4/9/08 Transcript at 36. We agree.

The murder and intimidation charges were not joined together solely because they were of the same or similar character. Rather, the charges were clearly part of a series of acts connected together because the intimidation charge specifically related to the stabbing of Ivey. Thus, Barr did not have an absolute right to a severance of the offenses. Instead, severance was within the trial court's discretion. Pursuant to Ind. Code § 35-34-1-11, the trial court needed to take into consideration the number of offenses charged, the complexity of the evidence to be offered, and whether the jury would be able to

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charge, which was granted by the trial court.

distinguish the evidence and apply the law intelligently as to each offense. The jury was required to consider only a small number of offenses, which were not particularly complex. Further, the evidence between the two charges was easily distinguishable, and we find no indication that the jury would have been unable to apply the law intelligently. We conclude that the trial court did not abuse its discretion by denying Barr's motion for severance as to the murder and intimidation charges. See, e.g., Moore v. State, 545 N.E.2d 828, 830 (Ind. 1989) (holding that the trial court did not abuse its discretion by denying the motion to sever the robbery and resisting arrest charges).

II.

The next issue is whether the trial court erred by instructing the jury regarding voluntary manslaughter but denying Barr's proposed involuntary manslaughter instruction. At the trial, Barr proposed that the trial court instruct the jury regarding the lesser included offenses of reckless homicide and involuntary manslaughter. The State did not object to the reckless homicide instruction, and the trial court agreed to give that instruction. However, the State objected to the involuntary manslaughter instruction. The State also suggested that an instruction on voluntary manslaughter would be appropriate, and Barr objected to the giving of a voluntary manslaughter instruction. Ultimately, the trial court gave instructions on murder, voluntary manslaughter, and reckless homicide. On appeal, Barr argues that the trial court erred by giving the voluntary manslaughter instruction but denying the proposed involuntary manslaughter instruction.

In Wright v. State, 658 N.E.2d 563, 566-567 (Ind. 1995), the Indiana Supreme Court clarified the circumstances under which a trial court should instruct a jury on a lesser included offense of the crime charged and set forth a three-part test. First, the trial court should determine whether the lesser offense is inherently included in the charged offense. 658 N.E.2d at 566. If the offense is not inherently included, then the trial court should determine if it is factually included in the charged offense. Id. at 567. Finally, if the offense is either inherently or factually included in the charged offense, the court should examine the evidence and determine whether there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense. Id.

Where a trial court makes a finding as to the existence or absence of a substantial evidentiary dispute, we review the trial court's rejection of a tendered instruction for an abuse of discretion. Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998). However, if the trial court rejects the tendered instruction on the basis of its view of the law, as opposed to its finding that there is no serious evidentiary dispute, appellate review of the ruling is de novo. Id.

A. *Involuntary Manslaughter*.

We begin by addressing Barr's argument regarding the trial court's denial of his proposed involuntary manslaughter instruction. Barr argues that the trial court should have given the following tendered instructions:

Defendant's Instruction No. 4

The crime of Involuntary Manslaughter is defined by statute as follows:

1. A person who kills another human being;
2. while committing a Class C or D Felony that inherently poses a risk of serious bodily injury;
3. commits a [sic] Involuntary Manslaughter, a Class C Felony.

Defendant's Instruction No. 5

The crime of criminal recklessness is defined by statute as follows:

A person who recklessly, knowingly or intentionally inflict [sic] serious bodily injury on another person that resulted in serious bodily injury to a person commits criminal recklessness, a Class D felony. However, the offense is a Class C felony if committed by means of a deadly weapon.

To convict the defendant, the State must have proved each of the following elements:

The defendant:
1. recklessly,
2. inflicted serious bodily injury on Adrian Ivey
3. by means of a deadly weapon, to wit, a knife.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty.

Appellant's Appendix at 141-142.

Ind. Code § 35-42-1-4(c) provides: "A person who kills another human being while committing or attempting to commit: (1) a Class C or Class D felony that inherently poses a risk of serious bodily injury; (2) a Class A misdemeanor that inherently poses a risk of serious bodily injury; or (3) battery; commits involuntary manslaughter, a Class C felony." At the trial, Barr argued that subsection (1) applied and that criminal recklessness was the applicable "Class C or Class D felony that inherently poses a risk of serious bodily injury." On appeal, Barr seems to argue that subsection (3)

concerning battery applies. At the trial, Barr tendered an instruction regarding involuntary manslaughter through battery, but he later withdrew the instruction. "[A]s a general rule, a party may not present an argument or issue on appeal unless the party raised that argument or issue before the trial court." Washington v. State, 808 N.E.2d 617, 625 (Ind. 2004). Barr has waived any assertion that subsection (3) concerning battery applies.

Further, at the trial, in support of his assertion that subsection (1) applied, Barr tendered the above instruction on criminal recklessness. However, taken together, the tendered instructions were incomplete and misleading. The tendered involuntary manslaughter instruction did not mention criminal recklessness, leaving no connection between the tendered involuntary manslaughter instruction and the tendered criminal recklessness instruction. The tendered criminal recklessness instruction would have instructed the jury that it could find Barr guilty of criminal recklessness, but Barr was not charged with criminal recklessness. Under these circumstances, the trial court did not err by denying Barr's proposed instructions. See, e.g., Richardson v. State, 697 N.E.2d 462, 465 (Ind. 1998) (holding that a trial court may properly refuse a tendered instruction on an asserted lesser included offense where the proffered jury instructions are incomplete and potentially confusing).

B. *Voluntary Manslaughter*.

Next, we address Barr's argument regarding the trial court's use of the voluntary manslaughter instruction. Ind. Code § 35-42-1-3(a) governs the offense of voluntary

manslaughter and provides: "A person who knowingly or intentionally: (1) kills another human being . . . while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon." The Indiana Supreme Court has held that "voluntary manslaughter is a lesser-included offense to murder." Watts v. State, 885 N.E.2d 1228, 1231 (Ind. 2008). "[I]f there is no serious evidentiary dispute over sudden heat, it is error for a trial court to instruct a jury on voluntary manslaughter in addition to murder." Id. at 1232. "[A]ny appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter." Roark v. State, 573 N.E.2d 881, 882 (Ind. 1991).

Barr argues that the trial court abused its discretion by giving the instruction because there was no serious evidentiary dispute as to sudden heat. "Sudden heat occurs when a defendant is provoked by anger, rage, resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." Conner v. State, 829 N.E.2d 21, 24 (Ind. 2005). "Sudden heat excludes malice, and neither mere words nor anger, without more, provide sufficient provocation." Id.

According to Barr, there was "absolutely no evidence of sudden heat," and he stabbed Ivey as a "reflex" or "accident." Appellant's Brief at 15. On the other hand, the State points out that Barr and Ivey were in a heated argument. Ivey was patting Barr down and reaching into his pockets, and Barr told him to "back off" because "you don't know me like that." State's Exhibit 20. Barr also said, "Man, you don't be reaching on

me like that, man." Id. Barr told Ivey to "get up off him," but Ivey refused. Id. Barr then told Ivey that he would "pop" him with a gun if Ivey did not stop reaching into his pockets. Id. Barr pulled a knife out of his pocket and said, "you better get off me." Id.

We conclude that the evidence of a heated argument between Barr and Ivey supports a finding of a serious evidentiary dispute as to sudden heat. Under these circumstances, the trial court did not err by instructing the jury regarding voluntary manslaughter. See, e.g., Clark v. State, 834 N.E.2d 153, 159 (Ind. Ct. App. 2005) (holding that a serious evidentiary dispute existed as to sudden heat and that the defendant was entitled to an instruction on voluntary manslaughter).

III.

The final issue is whether the trial court abused its discretion by denying Barr's motion for a directed verdict on the intimidation charge. When a defendant moves for a directed verdict, also known as a motion for judgment on the evidence, the court is required to withdraw the issues from the jury if: (1) the record is devoid of evidence on one or more elements of the offense; or (2) the evidence presented is without conflict and subject to only one inference, which is favorable to the defendant. Farris v. State, 753 N.E.2d 641, 647 (Ind. 2001); Ind. Trial Rule 50.

The offense of intimidation is governed by Ind. Code § 35-45-2-1, which provides, in part: "(a) A person who communicates a threat to another person, with the intent: (1) that the other person engage in conduct against the other person's will . . . commits intimidation, a Class A misdemeanor." The offense is a class C felony if, "while

committing it, the person draws or uses a deadly weapon." Ind. Code § 35-45-2-1(b). The charging information provided that Barr "communicated a threat to Vincent Davidson, with the intent that Vincent Davidson engage in conduct against his will, by pointing a knife at Vincent Davidson and demanding that Vincent Davidson leave him alone, while Vincent Davidson was attempting to convince [Barr] to turn himself into the police, and the knife used was a deadly weapon." Appellant's Appendix at 9.

At trial, Barr requested a directed verdict as to the intimidation charge because "there was no evidence that Vincent Davidson engaged in any conduct against his will." Transcript at 348. The trial court denied the motion because it was "irrelevant" whether Davidson actually engaged in conduct against his will. Id. at 351. Rather, the trial court found that the offense was complete when the intimidation was communicated. On appeal, Barr also argues that the State failed to prove that Davidson "engaged in any conduct against his will." Appellant's Brief at 20.

The State presented evidence that Davidson saw Barr in a grocery store on the day after Ivey died. Davidson asked Barr about the previous evening and asked him to turn himself in to the police. Barr got "hostile," pulled out a knife, and "threatened to kill [Davidson] like the guy he had killed the night before." Transcript at 184. Barr then ran out of the grocery store with Davidson chasing him, Davidson flagged down a police officer, and Barr was apprehended. We agree with the trial court that whether Davidson engaged in conduct against his will is irrelevant. The offense was complete when Barr communicated a threat to Davidson with the intent that Davidson engage in conduct

against his will. We conclude that the trial court did not err by denying Barr's motion for a directed verdict. See, e.g., Anderson v. State, 774 N.E.2d 906, 913 (Ind. Ct. App. 2002) (holding that the evidence was sufficient to sustain the defendant's conviction for intimidation where, after the defendant shot another person, he approached the intimidation victim and threatened him with a gun).

For the foregoing reasons, we affirm Barr's convictions for voluntary manslaughter as a class A felony, intimidation as a class C felony, and his status as an habitual offender.

Affirmed.

ROBB, J. and CRONE, J. concur